SUPREME COURT, U.S.
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No. 03-850

IN THE SUPREME COURT OF THE UNITED STATES

RIGOBERTO AVILA,
Petitioner,

v.

DOUG DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the admission of certain autopsy photographs during the guilt-innocence phase of trial violated Avila's Fourteenth Amendment right to due process.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Rigoberto Avila, Jr., ("Avila")[1] was properly convicted and sentenced to death for the brutal murder of 19-month-old Nicholas Macias. In the instant petition for certiorari review, Avila claims that his Fourteenth Amendment right to due process was violated by the admission of certain autopsy photographs during the guilt-innocence phase of his trial. However, as demonstrated below, this claim is not properly before this Court. Even if it were, the admission of these photographs did not render the proceedings fundamentally unfair. Thus, certiorari review should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The Texas Court of Criminal Appeals summarized the evidence supporting Avila's capital murder conviction in its direct appeal opinion:

> Around 6:00 p.m. on February 29, 2000, Marcelina Macias left her home to attend a class, leaving her 19-month-old, Nicholas Macias, and his four-year-old brother, Dylan Salinas, in [Avila's] care. At 7:02 p.m., [Avila] called "911" and told the operator that the infant boy he was babysitting stopped breathing. When the paramedics arrived, they administered emergency treatment to the child before transporting him to the hospital. While treating the boy, paramedics found a bruise on Nicholas' stomach in the shape of a boot print. When they asked

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[1] Respondent State of Texas will be referred to herein as "the State."

> [Avila], he denied any knowledge of the marking. At the hospital, doctors determined that surgery was necessary to save Nicholas' life. However, attempts to repair injury to Nicholas' intestines and other abdominal related injuries were unsuccessful, and Nicholas died.
>
> An autopsy revealed that major organs in Nicholas' body had been split in two by considerable blunt-force trauma consistent with being stomped by an adult. Specifically, the medical examiner reported that Nicholas "died of internal bleeding due to massive abdominal trauma resulting from blunt for[ce] injury" The surgeon's testimony likened Nicholas' injuries to those caused by such events as exiting an automobile traveling at sixty miles per hour or being dropped twenty feet.

Avila v. State, No. 74,142, slip op. at 2 (Tex. Crim. App. July 2, 2003)(unpublished).

II. Direct Appeal and Postconviction Proceedings

Avila, represented by counsel, pursued an automatic direct appeal to the Texas Court of Criminal Appeals. The court affirmed Avila's conviction and sentence in an unpublished opinion issued on July 2, 2003. *Avila v. State,* No. 74, 142. Avila subsequently filed a motion for rehearing which the court denied on September 10, 2003. *Id.* The instant petition for writ of certiorari followed.

ARGUMENT

I. The Question Presented for Review Is Unworthy of the Court's Attention.

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion,

and will be granted only for "compelling reasons." SUP. CT. R. 10 (West 2003). Avila advances no compelling reason in this case, and none exists. Thus, certiorari review should be denied.

II. Avila's Claim Regarding the Admissibility of the Autopsy Photos Is Not Properly Before This Court.

Avila complains that he was denied due process when the trial court allowed the State to introduce State's Exhibits 17 and 18, two autopsy photographs, over his objection during the guilt-innocence phase of trial. Counsel objected to the admission of these photographs on the grounds that they were gruesome, repetitive of testimony describing the injuries, and prejudicial. 20 CR 38-39. Avila challenged the trial court's decision to admit these exhibits on direct appeal, alleging that the court's ruling violated Rule 403 of the Texas Rules of Criminal Evidence 403, which provides

> [a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

Tex. R. Evid. 403 (2000). The Court of Criminal Appeals held that "the trial court abused its discretion in determining that the probative value of these photographs was not substantially outweighed by the danger of unfair prejudice." *Avila*, slip op. at 17. However, the Texas court denied relief after concluding that the error was harmless under Texas Rule of Appellate Procedure 44.2(b).[2] *Id.* at 17-18.

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[2] This rule states that "[a]ny other [non-constitutional] error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Tex. R. App. Proc.

At no time, prior to the filing of the instant petition, did Avila raise a federal question regarding the introduction of State's Exhibits 17 and 18 during the guilt-innocence phase. In both the trial and state appellate courts, his challenge to the admissibility of these autopsy photographs was based purely on state law grounds. Consequently, the court below was not provided the opportunity to rule upon the federal question presented in the instant petition.

The cases are legion that this Court will not decide issues raised for the first time on petition for certiorari, and that the Court will not decide federal questions not raised and decided in the court below. *E.g., Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 218-222 (1983); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Hill v. California*, 401 U.S. 797, 805-806 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). In articulating this requirement, the Court has stressed the long-standing nature of the rule:

> [I]n *Crowell v. Randall*, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, 20 § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391.

Cardinale v. Louisiana, 394 U.S. at 439. To properly invoke the jurisdiction of the Court, it is crucial that the federal question not only be raised in the prior proceedings, but that it be raised at the proper point. *Beck v. Washington*, 369 U.S. 541, 550 (1962); *Godchaux Co., Inc. v. Estopinal*, 251 U.S. 179, 181 (1919).

44.2 (b)(2000).

Because Avila did not contest the admissibility of the autopsy photographs on federal constitutional grounds in the court below, this Court is without jurisdiction to consider the merits of the instant petition for writ of certiorari.[3]

III. Regardless, the Introduction of the Autopsy Photos During the Guilt-Innocence Phase of Trial Did Not Render the Proceedings Fundamentally Unfair.

Contrary to Avila's assertions, the admission of the two autopsy photographs in question did not render his trial fundamentally unfair such that he was deprived of due process. Although the Court of Criminal Appeals held on direct appeal that these photographs were inadmissible under state evidentiary rules because the danger of unfair prejudice outweighed their probative

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[3] Avila argues that any procedural default of his claim may be excused because barring review of this petition would result in a fundamental miscarriage of justice. *See* Petition at 19-20 (citing *Smith v. Murray*, 477 U.S. 527 (1986); *Romano v. Oklahoma*, 512 U.S. 1 (1994)). However, this case does not even present and issue of procedural default because the state court did not decline to review a federal constitutional claim raised before it based on a state procedural ground; rather, Avila never raised the federal constitutional claim in the court below. This failure divests this Court of jurisdiction to review the judgment. Furthermore, even if procedural default were an issue, unlike federal habeas proceedings in which the procedural default doctrine is grounded in principles of comity and federalism but subject to the miscarriage of justice exception, in cases on direct review, the Court in fact lacks jurisdiction to review procedurally defaulted claims. *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997). Regardless, for the reasons set out in section III, *infra*, the refusal of this Court to consider the instant petition will not result in a fundamental miscarriage of justice.

value, the erroneous admission of evidence does not automatically implicate a due process violation. Relief under the Fourteenth Amendment Due Process Clause is available only where the evidence introduced is "so unduly prejudicial that it renders the trial fundamentally unfair." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). When weighed against the remaining evidence introduced during the guilt-innocence phase of Avila's trial, it is clear that Avila was not unfairly prejudiced by the introduction of these photographs.

State's Exhibit 17 shows the upper one-third of Nicholas' body. His chest is open with the ribs spread and the organs removed, and the front half of his scalp has been cut and peeled down over his face. *Avila*, slip op. at 12; Petition at 34a. State's Exhibit 18 shows Nicholas' head and shoulders from the back. In this photograph, the back half of Nicholas' scalp has been peeled down and is hanging across his shoulders. These exhibits were offered to show the jury the additional injuries Nicholas had suffered, namely, five bruises on his head, which according to the medical examiner's testimony, resulted from five different blows. 20 CR 40-44.

Avila argues that the admission of these photographs was extremely prejudicial because they depict the victim as if he were "some sort of butchered animal," and imply that the injuries visible in the photographs were attributable to him. Petition at 22-23. However, the jury heard paramedic Marco Villalobos testify that, upon arriving at the scene, the only visible injury to 19-month-old Nicholas was the boot-shaped bruise on Nicholas' stomach. 19 CR 170-71, 173-74. Indeed, Villalobos and Robert Farina, another paramedic, testified that they initially treated Nicholas for lack of oxygen from smothering. 19 CR 164, 172. Clearly, there was little chance that the jury was confused by the autopsy photos into believing that Avila caused the "injuries" depicted therein.

Avila also suggests that the autopsy photographs were unduly prejudicial because they were introduced to show the jury injury to the victim that was irrelevant to the crime charged. That is, the photographs depicted five separate bruises to the head that pre-dated the night of the murder and could not be linked to Avila.[4] However, the evidence at trial focused on the fact that Avila was the last adult to be with Nicholas before he received the crushing blow to the abdomen, an injury so severe that it severed his internal organs and caused his death. 19 CR 28-32. Notably, Avila confessed to inflicting this injury. 19 CR 34, 40-41, 44, 47. The medical examiner very clearly testified that the bruises on Nicholas' head were not inflicted on the day of his death, nor did they contribute to his death. 19 CR 40-44. Moreover, the testimony regarding the bruising to the head was brief and not emphasized to the jury. Accordingly, there is fair assurance that any error in admitting these photographs did not unduly influence the jury's verdict at either stage of the proceedings, and that no due process violation exists here.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court deny Avila's petition for writ of certiorari.

Respectfully submitted,

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[4] Initially, it should be noted that Avila waived this objection by failing to object when this same information was introduced through the testimony and autopsy report of the medical examiner, Dr. Contin. *See Avila*, slip op. at 15.

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